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No. 1485

In The

Supreme Court of the United States

OCTOBER TERM, 1970

TEX TAN WELHAUSEN COMPANY AND
TEX TAN WESTERN LEATHER COMPANY, DIVISION
OF TANDY CORPORATION,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
Intervenor-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

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Opinions Below

The Decision and Order of the National Labor Relations Board is reported at 172 NLRB No. 93 (See Pet. App.,[1] A18-A177).

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[1] "Pet. App." refers to the Appendices of Petitioner's Application for Writ of Certiorari.

The first Opinion of the Court of Appeals for the Fifth Circuit rendered November 21, 1969, enforcing the Order of the NLRB is reported at 419 F. 2d 1265 (Pet. App., A-7 to A-14).

Certiorari was granted and the case remanded by *per curiam* Opinion, 397 U.S. 819; 25 L.Ed. 2d 805 (1970), viz:

> "The Petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of H. K. Porter Co., Inc. v. National Labor Relations Board, 397 U.S. 99, 25 L. Ed. 2d 146, 90 S.Ct. 821."

The Opinion of the Court of Appeals for the Fifth Circuit, on remand, rendered November 5, 1970, is reported at 434 F. 2d 405, and reproduced at Pet. App. pp. A-1 - A-5.

Jurisdiction

We acknowledge jurisdiction under 28 U.S.C. §1254(1).

Questions Presented

I.

Whether there is substantial evidence to support the NLRB finding that petitioner-employer failed to bargain collectively in good faith with respondent union as required by §8(a)(5) of the Act, 29 U.S.C. §158(a)(5)?

II.

Whether the NLRB Order, as modified by the Court of Appeals, is appropriate to remedy the employer's unfair labor practices?

Statute Involved

Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. §158(a)(5) and 158(d) define the duty to bargain, viz:

> "It shall be an unfair labor practice for an employer— . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). . . .
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

Section 10(a) and (c), 29 U.S.C. §160 empower the Board to issue remedial Orders, viz:

> "The Board is empowered, as hereinafter pro-

vided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

Statement of the Case

This is a conventional failure to bargain case. Employer met and went through the motions in a series of meetings as disclosed in a seven-volume, three thousand five hundred page record. But as the Board in a carefully articulated 156 page Opinion (Pet App. pp. 21 - A-177), and the Court of Appeals found upon careful review of this "mammoth record" (Pet. App. A-10; 419 F. 2d 1265 at 1268-1269):

> ". . . there is ample evidence in the record to sustain the Trial Examiner's finding that Tex Tan did refuse to bargain in good faith regarding the piecework standards and grievances, and that its overall approach to bargaining was not indicative of a good faith attempt to reach contract terms.

"The Company asserts in its defense that there was no refusal to bargain and that the Trial Examiner found it guilty because he did not like the manner in which it bargained, the order in which subjects were discussed, its failure to make concessions, and its overall bargaining strategy. The evidence, however, does not support these contentions. The Trial Examiner noted that he did not intend by the enumerations of the examples of Tex Tan's behavior to 'indicate that each such action or nonaction by itself, would in all circumstances show bad faith.' Rather, he noted that 'an overall appraisal of Tex Tan's bargaining compels the conclusion that it did not approach the negotiations "with an open mind and purpose to reach an agreement consistent with the respective rights of the parties".' The record unquestionably supports the Trial Examiner's conclusion. It is true as the Company asserts that it continued to conduct many prolonged negotiating sessions. It is also true that the employer's mere refusal to concede during contract negotiations is not in itself a refusal to bargain. (citing cases) However, the record demonstrates that during these sessions Tex Tan was really engaged in what this court has termed mere 'shadow boxing to a draw,' (citing cases). In fact we detect an air of filbustering from the inception of negotiations through the administrative moils. Obduracy and obstinancy may be weapons of bargaining, but where they are used not in the interest of bargaining but in its frustration, we cannot give them sanction or refuge. Procrastination and negativity are not components of negotiation. (citing cases) The Act requires more than pretense. There is a duty

> on both sides, though difficult of legal enforcement, to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement.' (citing cases) While the Act does not require bargaining table surrender, it does require good faith discussions. Tex Tan breached this duty and was, therefore, guilty of an unfair labor practice. (citing cases)."

Petitioner-employer redundantly asserts (Petn., p. 10) that "the Board found that the company intended to make a collective bargaining agreement with the union . . ." The petition cites "A-144" in support. The cited reference is to a recital of the employer's contention, viz: *"Respondent contends* that the allegation in the complaint that it negotiated "in bad faith with no intention of entering into any . . . agreement" is contradicted . . . by the fact that 'the company stood ready and willing to execute' its July 28 proposed contract. *This contention* is based upon a misreading . . . etc." (Emphasis added).

There is no finding that Tex-Tan intended to make a contract. To the contrary, the thrust of detailed findings at Pet. App. pp. A-24-124, and the specific conclusions as to refusal to bargain at A122-144, are that Tex-Tan's actions ". . . betray the absence of good faith purpose to reach agreement" A138.

On the basis of lengthy, precise and carefully articulated findings the NLRB concluded that Tex-Tan refused to bargain in good faith, and in

addition to conventional cease and desist order against refusal to bargain, and affirmative requirement of good faith bargaining, tailored a series of specific requirements which, in the Board's view, were corrective of the specific manifestations of unfair labor practices.[2]

On original submission the Court of Appeals for the Fifth Circuit enforced the Board order in full, 419 F. 2d 1265 (November, 1969). Thereafter, the Supreme Court decided *H. K. Porter v. NLRB,* 397 U.S. 99; 25 L. Ed. 2d 146 (1970), holding that the Board lacked "power to remedy the unfair labor practices by requiring the company to agree to check-off . . ."

Tex-Tan asserted, on original certiorari that the remedy in the instant case ran afoul the *Porter* decision. The Supreme Court, on only the certiorari papers and without record, or oral argument, granted certiorari, vacated the judgment, and remanded to the Fifth Circuit "for further consideration in light of *H. K. Porter.*"

On remand, the Circuit Court, by another panel, again enforced the conventional bargaining, reinstatement, back pay and notice posting requirements of the Board's Order, 434 F. 2d 405.

Those portions of the Board's order by which the Board attempted to remedy the company's bad

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[2] These related principally to employer's insistence upon unilateral control of piece work wage determinations and limitation of grievances with regard thereto. See Section entitled "Remedy," Pet. App. pp. A164ff.

faith approach to the negotiations by compelling the inclusion of specified contractual provision relating to grievances and piece work were deleted. 434 F. 2d 405 at 407-408.[3]

The modification was only as to the remedy. The fact findings and the determination that Tex-Tan refused to bargain in good faith were reaffirmed.[4]

Accordingly, petitioner's several assertions that (App. 14ff.) "substantially all of the alleged violations . . . were found not to be violations under H. K. Porter" are wholly baseless.

Reasons for Denial of Certiorari

1.

The Petition Attempts to Present Fact Issues

Two panels in the Circuit Court have concluded that there is ample evidence in a record of over three thousand pages to sustain the Board's find-

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[3] The specific modification was: 434 F.2d at 407:

"[1] Consequently, we hereby modify the previous decision of the Court and deny enforcement of the Board's order insofar as the prior decision enforces those portions of the Board's order which would require the Companies to cease and desist from '(a) insisting, as a condition to entering into an agreement * * *', upon a provision depriving the employees of their right to file grievances on the establishment of standards for piecework, '(b) insisting, as a condition to entering into an agreement * * *, upon excluding from such agreement any definition or guiding principle as to productivity speed ratings * * *.' and '(d) insisting * * * upon being given the right to fix the rates of pay of its piecework employees unilaterally'."

[4] The Petition (at p. 10) in asserting: "The second opinion is plainly wrong in persisting in the error made in the original opinion treating this case as a 'surface bargaining' case," recognizes that two separate panels in the Circuit Court have held the Board's findings and conclusions on the merits are supported by substantial evidence.

ing that Tex-Tan did refuse to bargain in good faith.

The petitioner's attempt to present evidentiary issues to the Supreme Court will not do. Whether on the record as a whole there is substantial evidence to support the Board's findings is a question to be answered in the Court of Appeals. *H. G. Heinz Co. v. NLRB,* 311 U.S. 514; *NLRB v. Pittsburgh SS Co.,* 340 U.S. 498; *NLRB v. Walton,* 369 U.S. 404.

2.

The Remedy

A.

The Orders to Bargain

The Board's Order, as modified by the Second Opinion of the Court of Appeals, is a conventional order, clearly required by the record. See Pet. App. pp. A-122 - A-177, deleting, however, paragraphs 1a, b and d in accordance with the second opinion of the Court of Appeals. See footnote 3, *supra.*

In short, besides requiring good faith bargaining, it (1) forbids employer refusal to incorporate into a *written* contract its agreement as to productivity, etc. (This follows "well settled law," *H. J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941) · (2) forbids employer refusal to furnish the union its written job descriptions (information necessary to bargaining or grievance presentation, see *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-436).

Affirmatively, the Order requires bargaining; furnishing of information relevant for bargaining; offer, to named individuals who were the victims of employer discrimination, of reinstatement and back pay; pay vacation to those from whom it was discriminatorily withheld; preserve relevant records for back-pay computation; expunge discriminatory recordations from specified personnel files; and post conventional notices advising employees of their rights.

This conventional order is absolutely necessary to vindication of the public policy which the Board enforces; and well within its powers. Indeed, in *Porter* this Court said, 397 U.S. 819, 821: ". . . we hold that while the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision." This order as modified by the Court of Appeals accomplishes the former—it makes no effort to require the latter.

B.

The Reinstatement and Back Pay Requirements

Petitioner's challenges to the findings and conclusions that employer's unfair labor practices were the cause of the strike against present factual issues, inappropriate for review here.

The Board and two Circuit Court panels have been satisfied that the overwhelming evidence re-

quires the conclusion that employer's unfair labor practices resulted in an unfair labor practice strike —that the employer's refusal to reinstate the strikers upon unconditional application was discriminatory and unlawful. Cf. *Mastro Plastics Corp v. NLRB,* 350 U.S. 270, 278.

Similarly, denial of vacation pay to strikers, while affording it to non-strikers was discriminatory and unlawful. At least since *NLRB v. Fleetwood Trailer,* 389 U.S. 375, at 378, and *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 at 34, it has been clear that the denial of benefits to strikers which are otherwise available to non-strikers violates the Act, in the absence of showing substantial and legitimate business interests served by the denial. Again, the matter is factual. Discrimination is shown, and no substantial business interest justifying the discrimination appears.

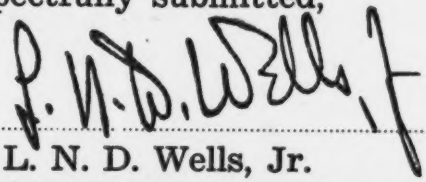
CONCLUSION

The factual issues presented by the petition are matters for the Board and the Courts of Appeals. They have been carefully evaluated and determined in a Board decision of more than one hundred and fifty pages, and carefully reviewed by two different panels of the Court of Appeals. Certiorari should not be granted merely to again sift the evidence.

Nor are there legal issues of significance—those attempted to be presented, are bottomed upon factual assertions contrary to the findings below.

Accordingly, certiorari should be denied.

Respectfully submitted,

By 

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